provides that appeals shall be decided in accordance with the opinion of the majority of judges composing the Court. Read in the light of section 67(1), the jurisdiction of the Supreme Court in regard to civil appeals shall specifically be to hear an appeal from any judgment or order of any High Court. There is certainly no provision which confers jurisdiction on a Supreme Court to hear and determine appeals from a decision given in an appeal it has already heard and disposed of.

Where, therefore, a final decision has been delivered, an appeal is in effect heard and disposed of. In other words, it is brought to a final conclusion. And that being the case, the Supreme Court has no power to re-open, re-hear and re-examine its decision for whatever purpose. The only exception where there can be a re-hearing is only to the extent provided by section 42, in particular sub-section (3) of section 42. The other exception is as provided under section 44 sub-section (3) to the effect that every order such as that envisaged in sub-section (1) of section 44 may be discharged or varied by the full Court.

For reasons we have stated, this application is accordingly dismissed with costs.

Application dismissed.

Solicitors: *Sri Ram, Zulkifly & Kumar; Arthur Lee & Co.; Balarajah & Co.*

UNITED MANUFACTURERS SDN. BHD. (IN RECEIVERSHIP) v. GURU TIMBER SDN. BHD. & ANOR.

[O.C.J. (George J.) September 10 & 25, 1984]
[Kuala Lumpur – Civil Suit No. C 1369 of 1982]

Hire Purchase – Failure to pay instalments – Both hirer and guarantor liable.

Practice and Procedure – Pleadings – Plaintiff to reply to counterclaim of defendant within 14 days – Does not affect right of the plaintiff to proceed with Order 14 application – R.H.C. 1980, O.14 & O.18 r.3.

In this case the plaintiff sold three tractors to the first defendant on the guarantee of the second defendant under separate hire-purchase agreements. The hirer fell into arrears of the monthly rental. A new schedule of payments was arrived at between the parties. The hirer again defaulted in payment of agreed amounts. The plaintiffs then brought an action against the hirer and his guarantor. The first defendant raised the plea that plaintiffs failed to rectify defects in tractors and rescinded the contract. He also counterclaimed against the plaintiffs for the damages arising from the alleged breach of warranty. The first defendant also raised the preliminary objection that there was inordinate delay on the part of the plaintiffs to reply to the counter claims of the first defendant. The Senior Assistant Registrar at the hearing of summons-in-chambers dismissed the claim of the plaintiffs. The plaintiffs appealed to the judge in chambers.

Held, allowing the appeal: (1) the counter claim was a sham defence. Defects in tractors were of a minor nature. They did not amount to a breach of the alleged warranty;

(2) the plaintiffs were under receivership, the staff had been reduced from 320 to only 32, hence there was delay in taking out Order 14 proceedings;

(3) the fact that a reply and defence to counter claim was filed does not have the effect of precluding the plaintiff from proceeding with the Order 14 application.

Cases referred to:

(1) *Comptroller-General of Inland Revenue, Malaysia* v. *Weng Lok Mining Co. Ltd.* [1969] 2 M.L.J. 98.
(2) *Societe Des Etains De Bayas Tudjuh* v. *Woh Heng Mining Kongsi* [1978] 2 M.L.J. 267.
(3) *McLardy* v. *Slateum* (1890) 24 Q.B.D. 504.

CIVIL SUIT.

Loh Lee Choo for the plaintiffs/appellants.
William J.K. Leong for the defendants/respondents.

Cur. Adv. Vult.

George J. : By way of a separate hire purchase agreement for each tractor the 1st defendant purchased from the plaintiffs three tractors, each of the agreements being dated March 3, 1979. The 2nd defendant guaranteed the payment of the agreed monthly rentals in respect of each of the hire purchases. In respect of each of the agreements, the 1st defendant fell into arrears of the agreed monthly rentals.

On or about March 25, 1981 the 1st defendant agreed to settle the outstanding amounts then due in the terms of a new schedule of payments arrived at between the parties pursuant to which certain payments were made after which the 1st defendant defaulted in payment of the other agreed amounts. The plaintiffs' claim against the 1st defendant is on the basis of the repudiation of the hire purchase agreements. The claim against the 2nd defendant is on the guarantees. There is also a claim against the 1st defendant in respect of the cost of certain spare parts sold to the 1st defendant and in respect of repair services rendered.

The defence is that that the tractors and each of them has such mechanical defects that they could not be used for the purposes of logging operations which had been warranted to by the plaintiffs. The 1st defendant contends that upon the plaintiffs failing to rectify the defects in the tractors the agreements were rescinded by the 1st defendant on or before June 1, 1980. The 1st defendant has counterclaimed against the plaintiffs for the damages arising from the alleged breach of warranty.

I think that the defence is a sham defence. The correspondence in respect of the alleged mechanical defects suggests that the defects were comparatively speaking of a minor nature. Certainly it does not amount to a breach of the alleged warranty. In respect of at least one of the tractors, there had not been any complaint of any sort. The alleged rescission of the agreement "on or before June 1, 1980" is inconsistent with the subsequent conduct of the 1st defendant in particular holding on to the tractors and entering into a new schedule of payments in March 1981 and actually making substantial payments pursuant thereto.

The appeal is allowed. The order of the Senior Assistant Registrar given at the hearing of the Summons-in-Chambers dated August 6, 1983 (enclosure 10) is set aside. There will be judgment against the 1st and 2nd defendants for the sum of $634,220.99 together with interest thereon at 8% per annum from December 11, 1981 to realisation. The 1st defendant will further pay the sum of $14,444.84 with interest at 8% per annum from January 29, 1982 (being the day after the date of the letter of demand therefor) to realisation. The defendants will also pay the costs of the Summons-in-Chambers enclosure (10) and of this appeal.

[On the preliminary point taken at the hearing of the appeal, enclosure (23)]

The claim (as amended) against the 1st defendant was for the sum of $634,220.99 being damages alleged to have been suffered by the plaintiffs as a result of the 1st defendant's alleged repudiation of three hire purchase agreements which they had entered into with the plaintiffs in respect of certain tractors and for the further sum of $14,444.84 in respect of spare parts alleged to have been sold and for repair services said to have been rendered by the plaintiff to the 1st defendant. The claim against the 2nd defendant is as guarantor in respect of payment of the agreed monthly rentals for each of the hire purchases.

The writ was caused to be issued on July 20, 1982 and was served on the 1st defendant on August 13, 1982 who entered an appearance thereto on August 19, 1982. The 2nd defendant was served with the writ on September 13, 1982. He entered an appearance on September 28, 1982. The statement of defence and counterclaim of the 1st defendant was filed on September 3, 1982. The 2nd defendant filed his statement of defence on October 7, 1982. On October 13, 1982 the plaintiffs filed a reply and defence to the 1st defendant's defence and counterclaim.

It was only on August 6, 1983 that the plaintiffs took out their application to have the statement of defence of each of the defendants to be struck out and for summary judgment in terms of the prayers in the statement of claim. The application which was resisted by both the defendants eventually came on for hearing before the Senior Assistant Registrar who on May 10, 1984 dismissed the application with costs. The plaintiffs' appeal against this decision came on before me on August 24, 1984 by way of a rehearing of the application. Encik Williams Leong, counsel for the defendants –/respondents submitted as a preliminary point that I could and should dispose of the matter without going into the merits by holding that there was inordinate delay on the part of the plaintiffs' taking out their application and that in any event having filed and delivered the reply and defence to the counterclaim, the plaintiffs are estopped from proceeding under Order 14 of the Rules of the High Court.

After hearing counsel on it I ruled that the preliminary point was without merit. I then went on to hear the appeal and on September 10, 1984 allowed the appeal. I had delivered a short but written judgment. In doing so, I did not deal with the aforesaid preliminary point which omission I now remedy.

The judgment that is perhaps most often cited when the question of delay in applications for summary judgment comes up is that of Raja Azlan Shah J. (as he then was) in *Comptroller-General of Inland Revenue, Malaysia* v. *Weng Lok Mining Co. Ltd.*[1] Since 1978 the judgment of Abdoolcader J. (as he then was) in *Societe Des Etains De Bayas Tudjuh* v. *Woh Heng Mining Kongsi*[2] is also invariably cited. Each of those judgments relied on *McLardy* v. *Slateum,*[3] a judgment of the English Divisional Court which held that al-

though it was the intention of the Rules that the application for summary judgment should be made before a defence had been delivered in ordinary course, the plaintiff was not precluded from making it afterwards, but in such an event the onus is cast on the plaintiff of showing why he did not apply sooner.

In the instant case the plaintiffs sought to explain the long delay by the affidavit of one Mohd. Adib Haji Idris affirmed on April 20, 1984. Mohd. Adib said that he had been the plaintiffs' Deputy Manager in charge of operations since July 1979. He went on to explain that the plaintiffs had gone into receivership on February 25, 1982 upon the crystallisation of a debenture made between the plaintiffs and United Malayan Banking Corp. Bhd. I gathered from Mohd. Adib's affidavit that the plaintiffs apparently were owing some $27 million to various creditors against some $63 million due to the plaintiffs from various debtors. The Receivers and Managers appointed pursuant to the said debenture were faced with the task of, *inter alia*, finding out what amounts were due to the plaintiffs and where necessary filing actions for the recovery of the same. To avoid some of the actions being barred by limitation, the plaintiffs took out proceedings against various alleged debtors not necessarily after making a thorough study of the claims, one of which was the instant case. Encik Mohd. Adib Haji Idris went on to explain that the Receivers and Managers only came to know that the 1st defendant disputed the claim alleging breach of warranty and rescission of the agreements when the defence and counterclaim was filed. They had then embarked on an investigation to find out whether there were any merits in the contention of the 1st defendant. Encik Mohd. Adib went on to point out that the staff of the plaintiff company had been reduced from the 320 or so persons that it had before it went into receivership to only about 32. In the circumstances, there was the delay of the Receivers getting to appreciate the merits (or lack of it) of the contention of the 1st defendant and hence the delay in taking out Order 14 proceedings.

In the face of the fact that the plaintiff company was (and is) in receivership and that the action was filed at the instance of the Receivers and Managers working with some 10% of the original staff and in the face of there being nothing in the plaintiff company's records of the alleged rescission of the contracts (it turned out that the 1st defendant admits that the alleged rescission of the hire purchase contracts were made orally), I was satisfied that the delay in taking out the application had been adequately explained.

On the estoppel point, reference can be made to Order 18 rule 3. Upon the defendant serving upon the plaintiff a defence and counterclaim and where the defence calls for a reply, the plaintiff is required by the rules to include in the same document both a reply and defence to counterclaim and have it served on the defendant before the expiration of 14 days after the service on him of the defence and counterclaim.

In the face of that prescribed time frame and the fact that where a defence to counterclaim is not filed and served in due time default judgment could be entered against the plaintiff, and where the plaintiff can justify not taking out Order 14 proceedings until after delivery of the statement of defence, the fact that a reply and defence to counterclaim was filed does not have the effect of precluding the plaintiff from proceeding with the Order 14 application. The freezing of the running of time where Order 14 proceedings are instituted applies only in the situation where the Order 14 proceedings are instituted before the time to deliver the defence has expired.

Order accordingly.

Solicitors : *Skrine & Co.; Joseph Tan & Tang.*

MAA HOLDINGS SDN. BHD. & ANOR. v. NG SIEW WAH & ORS.

[O.C.J. (George J.) October 11, 1984]

[Kuala Lumpur – Civil Suit No. C532 of 1982]

Contract – Contract for the sale of all shares of a company owning land – Full payment made by purchaser – Purchaser to apply for approval of Foreign Investment Committee (FIC) – Sale not to be effected by late approval of FIC – Failure to apply to FIC – Contract can still be specifically enforced – Agency – Agent acting for undisclosed principal – Undisclosed principal can enforce contract – Contracts Act, 1950, ss. 183-186.

In this case the second plaintiff acting as agent of the first plaintiff (undisclosed principal) had entered into an agreement with five defendants (who were the only shareholders of Leeng Land Sdn. Bhd.) to purchase their shares for $8.1 million. $2 million were paid at the time of the execution of the agreement, balance of $6.1 million was